

GALLAND ENTERPRISE SDN BHD & ORS

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v.

SUPERMIX CONCRETE (EAST MALAYSIA) SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING

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LAU BEE LAN J

[CIVIL APPEAL NO: 12-5-2005-II]

17 JANUARY 2006

CIVIL PROCEDURE: Appeal - Memorandum and record of appeal - Preliminary objection - Service of notice of appeal - Contents of record of appeal - Draft of order being appealed against - Whether proper and in compliance with rules - Prejudice caused - Conduct of parties - Subordinate Courts Rules 1980, O. 1(A), O. 2 r. 3, O. 49 rr. 6(2), (3)

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CIVIL PROCEDURE: Pleadings - Striking out defence and counterclaim - Straightforward case - Arguable defences - Subordinate Courts Rules 1980, O. 14 r. 21 - Rules of the High Court 1980, O. 18 r. 19(1)

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This was an appeal by the 1st, 2nd and 3rd appellants (“defendants”) against the decision of the learned Sessions Court Judge made on 27 January 2005 allowing the respondent/plaintiff’s application to strike out the defendants’ defence and counterclaim and entering judgement against the defendants (“said decision”). Counsel for the plaintiff, in the appeal before this court, raised a preliminary objection (“PO”) on the basis of non-compliance with O. 49 r. 6 of the Subordinate Courts Rules 1980 (“SCR”) (no proper service of the Notice Of Appeal) by the defendants and on the basis that there was no proper appeal before this court in that the defendants’ record of appeal did not contain the sealed order and therefore the plaintiff did not know against what order the defendants were appealing. The defendants subsequently filed a Supplementary Record of Appeal enclosing a sealed copy of the order but counsel for the plaintiff took objection to the same. This court was asked to adjudicate on the PO.

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Held (allowing the defendant’s appeal with no order as to costs and setting aside the said decision):

[1] There should have been a proper service of the Notice of Appeal on the plaintiff. However the failure of the defendants to do so had not prejudiced nor resulted in any substantial miscarriage of justice to the plaintiff because

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- a* the plaintiff had acknowledged receipt of the Record of Appeal and therefore the plaintiff was deemed to know that there was an appeal pending. (p. 131 c-d)
- b* [2] Since the draft order had not been approved by the Registrar of the Subordinate Courts, in my judgement, it cannot constitute a proper draft order within the meaning of O. 49 r. 6(3)(d) of the SCR. Be that as it may, I observe that the draft order had been amended by the plaintiff counsel's firm. Further plaintiff's counsel did not deny that he was present together with the defendant's counsel in the Sessions Court on the date the said decision was handed down. In this regard, I therefore find that
- c* the non-compliance by the defendants has not caused any prejudice or substantial miscarriage of justice to the plaintiff and the contention of the plaintiff's counsel that the plaintiff was not aware of the order appealed from by the defendants cannot be sustained. In the circumstances, the preliminary objection of the plaintiff is dismissed. (p. 131 d-f)
- d* [3] Looking at the pleadings, I find that *prima facie*, the defence and counterclaim cannot be said not to disclose a reasonable cause of action. In answer to the plaintiff's claim against the 1st defendant for the balance of goods sold and delivered namely concrete, the plaintiff has raised the
- e* issue of short supply, overpayment, overcharging, the quantity of supply being subject to final measurement and the payment being back to back and in respect of the claim against the 2nd and 4th defendants they have raised the defence that the obligation under the letter of guarantee dated 30 June 1999 would only arise where the claim of the plaintiff against the 1st defendant became conclusive. (p. 132 g-h)
- f* [4] It is evident that the case is not as straightforward as what the plaintiff wishes the court to believe since the supply and delivery of concrete was made in the context of a running account as pleaded in para 4 of the defence and counterclaim which is fortified by para (iii) of the recital in
- g* the said agreement. Furthermore the agreement does not provide for the payment of interest at 1.5% per month from 30 January 2004 until full and final payment as claimed by the plaintiff. Eventhough there has been acknowledgement on the delivery orders by the defendants, such delivery orders are not conclusive as to the amount of the concrete supplied which
- h* is subject to final measurement but only as to delivery. (p. 133 f-g)
- i* [5] The striking out of the defence and counterclaim by summary procedure is a drastic cause of action and following the case of *Bandar Builders*, this is not a case where on the face of it the claim by the defendants is "obviously unsustainable" but I am satisfied that there is a reasonable cause of action and that there are arguable defences. (p. 134 a)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd [2000] 2 CLJ 457 CA (refd)

Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Berhad [1993] 4 CLJ 7 SC (refd)

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)

Subordinate Courts Rules 1980, O. 1(A), O. 2 r. 3, O. 14 r. 21, O. 49 rr. 6(2), (3)(d)

For the 1st, 2nd & 3rd appellants - Mohd Ivan Hussein; M/s Ivan Hussein

For the respondent - Jonathan Chong; M/s TC Chong & Co

Reported by Sharmini Pillai

JUDGMENT

Lau Bee Lan J:

This is an appeal by the 1st, 2nd and 3rd appellants/1st, 2nd and 4th defendants (hereinafter referred to as the “1st, 2nd and 4th defendants” or “the defendants” as the case may be) against the decision of the learned Sessions Court Judge made on 27 January 2005 allowing the respondent’s (“plaintiff”) application with costs to be taxed unless agreed (encl. 2). At the outset the learned counsel for the plaintiff, Mr. Jonathan Chong, raised a preliminary objection: firstly, although they have been served with the record of appeal, no notice of appeal was properly served on them in conformity with O. 49 r. 6 of the Subordinate Courts Rules 1980 (“the SCR”); secondly, there was no proper appeal before the court in that the record of appeal did not contain the sealed order and therefore the plaintiff would not know against what order the defendants are appealing against; instead what was in the record of appeal was merely the draft order at pp. 118-119 signed by both parties but not the registrar.

Mr. Ivan Hussein, learned counsel for the 1st, 2nd and 4th defendants replied that they had placed a copy of the notice of appeal in the pigeon hole of the firm of the plaintiff’s counsel in the court house. Subsequent to that when they sought the assistance of the learned counsel to approve the draft order so that it could be incorporated into the record of appeal, the learned counsel did not say anything on the notice of appeal not being served on their firm; as such they were not aware that they have not received the notice of appeal and were under the impression that they were aware of the notice of appeal; subsequently, when they served the record of appeal on the plaintiff, again they had no indication they did not receive the notice of appeal or that they objected to the record of appeal; otherwise they could make the necessary application to the court to extend or abridge time to redress any oversight on their part.

- a* To the court's query whether there is proof that the defendants have served the notice of appeal, Mr. Ivan Hussein stated he had made a notation in his file copy of cover letter to court to the effect "In pigeon hole at court house". To the court's question whether the plaintiff was raising this as a preliminary objection, Mr. Chong responded that the two points he has submitted on the competency of the appeal would be dealt with in the submission proper and to be fair, if the defendants needed to look into the matter, he had no objection to it. Mr. Ivan Hussein requested for time and a new hearing date was fixed.
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- c* On the date of hearing (28 October 2005), Mr. Ivan Hussein informed the court that the defendants had filed a supplementary record of appeal dated 21 October 2005 enclosing the sealed copy of the order of the learned Sessions Court Judge dated 27 January 2005 and reiterated his earlier submission. In reply, Mr. Chong maintained since there was no proof of service of the notice of appeal in the form of proof of personal service on his firm, it ought to be taken there was no service of the notice of appeal and legally there was no appeal before the court; the defendants had no business to file the supplementary record of appeal since it was not a case where he was unable to file the sealed order due to circumstances beyond his control but he did not go on with the sealing of the order; even if there is good reason for filing in of the supplementary record of appeal, it should be filed before the start of the appeal, so that by the time the appeal came for the hearing both court and all parties would have known what is the order appealed against; whereas in this instant case, we had started the appeal and he argued the supplementary record of appeal should not be accepted now as it prejudices the plaintiff because the plaintiff prepared the appeal and hearing without the sealed order and not knowing the actual terms of the order. In reply thereto, Mr. Ivan Hussein submitted that there is no prejudice to the plaintiff as they knew of the appeal and the order made by the Sessions Court since at the delivery of the ruling by the learned Sessions Court Judge, both he and Mr. Chong were present and in fact he was late and Mr. Chong has taken the decision.
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- g* Order 49 r. 6 (2) of the SCR, *inter alia*, provides that the notice of appeal to a judge in chambers shall be filed in the registry of the relevant subordinate court with a copy extended to the registry of the High Court within 14 days from the date on which the decision of the subordinate court is pronounced and serving a copy of the notice of appeal to every other party to the proceedings. Order 49 r. 6(3) of the SCR, *inter alia*, provides that the record of appeal shall contain a copy of "the order or the draf order of the decision appealed from". Mr. Chong raised a preliminary objection on two points
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- i* (i) there was no proper service of notice of appeal served on the plaintiff; and

(ii) the record of appeal did not contain the sealed order.

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The draft order dated 27 January 2005 is at pp. 118 - 119 of the record of appeal. Although the draft order has been amended by the plaintiff's counsel and both the plaintiff's and the defendants' counsel have signed the draft order, the said draft order has not been approved by the registrar of the subordinate courts. By virtue of O. 1(A) and O. 2 r. 3 of the SCR, the court is to consider the preliminary objection raised by the plaintiff and see whether the non-compliance by the defendants in effecting proper service of the notice of appeal and in not filing the "approved" draft order has occasioned a substantial miscarriage of justice. Mr. Ivan Hussien had stated that he had placed the notice of appeal in the pigeon hole of the firm of the plaintiff's counsel in the court house and there is a notation in his file copy of cover letter to the court to the effect "in pigeon hole in court house". I agree with Mr. Chong that there should have been a proper service of the notice of appeal on the plaintiff. However, the failure of the defendants to do so has not prejudiced nor resulted in any substantial miscarriage of justice to the plaintiff because the plaintiff has acknowledged receipt of the record of appeal and therefore the plaintiff is deemed to know that there is an appeal pending. Since the draft order has not been approved by the registrar of the Subordinate Courts, in my judgment, it cannot constitute a proper draft order within the meaning of O. 49 r. 6(3)(d) of the SCR. Be that as it may, I observe that the draft order has been amended by the firm of the plaintiff's counsel. Further, the plaintiff's counsel did not deny he was present together with the defendants' counsel in the Sessions Court on 27 January 2005 to obtain the ruling made by the learned Sessions Court Judge. In this regard, I therefore find that the non-compliance by the defendants has not caused any prejudice or substantial miscarriage of justice to the plaintiff and the contention of the plaintiff's counsel that the plaintiff is not aware of the order appealed from by the defendants cannot be sustained. In the circumstances, the preliminary objection of the plaintiff is dismissed.

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The application by the plaintiff dated 11 November 2004 made pursuant to O. 14 r. 21 of the SCR is, *inter alia*, for an order that (i) that the defence and counterclaim of the 1st, 2nd and 4th defendants all dated 13 October 2004 be struck out and judgment be entered against the 1st, 2nd and 4th defendants as prayed for in the statement of claim; (ii) that the plaintiff be given costs of this application; and (iii) such further or other orders this court sees fit. The grounds in support of the application are:

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(a) that the defence and counterclaim disclose no reasonable defence and cause of action;

(b) that the defence and counterclaim are scandalous, frivolous or vexatious;

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- a* (c) that the defence and counterclaim may prejudice, embarrass or delay the fair trial of the action; or
- (d) that the defence and counterclaim are otherwise an abuse of the process of the court.
- b* The legal proposition governing an application under O. 18 r. 19(1) of the RHC is enunciated in the Supreme Court case of *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Berhad* [1993] 3 MLJ 36 where the Supreme Court held at p. 43:
- c* The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC which is in para materia to O. 14 r. 21 of the SCRJ are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see AG of *Duchy of Lancaster v. L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*) ... The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
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- e* As far as the first ground in item (a) that the defence and counterclaim disclose no reasonable defence and cause of action, I refer to the authority of *Abdul Rahim bin Abdul Hamid & 4 Ors v. Perdana Merchant Bankers Bhd (dahulunya dikenali sebagai Intradagang Merchant Bankers (M) Berhad & 5 Ors* [2000] 2 AMR 1319 CA where at p. 1320 the Court of Appeal held:
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1. In considering an application under O. 18 r. 19(1) (a) of the RHC the court can only look at the statement of claim. The court should not pay any attention to evidence in the form of affidavits. Therefore in the present case, the court should disregard the affidavits in considering the application under O. 18 r. 19(1)(a) of the RHC.
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- Looking at the pleadings, I find that *prima facie*, the defence and counterclaim cannot be said not to disclose a reasonable cause of action. In answer to the plaintiff's claim against the 1st defendant for the balance of goods sold and delivered, namely, concrete, the plaintiff has raised issues of short supply, overpayment, overcharging, the quantity of supply is subject to final measurement and the payment is back to back; and in respect of the claim against the 2nd and 4th defendants they have raised the defence that the obligation under the letter of guarantee dated 30 June 1999 (exh. C) would only arise where the claim of the plaintiff against the 1st defendant becomes
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- i* conclusive.

As for the other grounds relied upon by the defendants in items (b), (c) and (d) above, the court following the case of *Abdul Rahim bin Abdul Hamid & 4 Ors v. Perdana Merchant Bankers Bhd (supra)*, is entitled to examine the affidavit evidence and the exhibits (see Held (3) (a) at p. 1321). Paragraph (2) of the statement of claim does not refer to any agreement in respect of the claim made by the plaintiff for balance of concrete sold and delivered to the 1st defendant but it merely states:

It is a term of the contract of sale that interest at 1.5% per month shall be payable by the defendant to the plaintiff for all amount outstanding after the fourteen (14) days credit term and the fourteen (14) credit term for the goods supplied, the last batch of which having been made on 15 January 2004, expired on 29 January 2004.

In the defence and counterclaim, the 1st defendant has put the plaintiff to proof as to particulars and breakdown of the plaintiff's claim (see para 2). In the affidavit in support of the application, the plaintiff averred that the concrete was sold and delivered to the 1st defendant pursuant to an agreement dated 28 October 2003 between the plaintiff and the 1st defendant (exh. B) (see para 5). If indeed the concrete sold and delivered was pegged on to the said agreement as alleged by the plaintiff, then why did they not in the first place plead the said agreement in the statement of claim? The terms and conditions contained in this agreement is material in this case and para. (iii) of the recital to the five agreement states:

The parties are desirous of settling existing accounts between them amicably and for the sub-contract works for the project to be completed on the terms and conditions hereinafter contained.

Therefore, it is evident that the case is not as straightforward as what the plaintiff wishes the court to believe since the supply and delivery of the concrete is made in the context of a running account as pleaded in para. 4 of the defence and counterclaim which is fortified by para. (iii) of the recital in the said agreement (exh. B). Furthermore, the agreement does not provide for the payment of interest at 1.5% per month from 30 January 2004 until full and final payment as claimed by the plaintiff. Even though there has been acknowledgement on the delivery orders by the defendants, such delivery orders are not conclusive as to the amount of concrete supplied which is subject to final measurement but only as to delivery.

The claim against the 1st, 2nd and 4th defendants under the continuing guarantee can only be established if there is a case made out against the 1st defendant in the first place.

a The striking out of the defence and counterclaim by summary procedure is a drastic cause of action. I find that following the case of *Bandar Builders (supra)* this is not a case where on the face of it the claim of the defendants is “obviously unsustainable” but I am satisfied that there is a reasonable cause of action and that there are arguable defences.

b In the circumstances, I reverse the order of the learned Sessions Court Judge and allow the appeal of the defendants but with no order as to costs due to the unsatisfactory conduct by the 1st, 2nd and 4th defendants with respect to the procedural aspect of this appeal.

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